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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DOMINIQUE STEWART, an individual,

11 Plaintiff,

12 v.

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14 WASHINGTON STATE UNIVERSITY, a
15 state educational institute,

16 Defendant.

Case No. C18-557-RSM

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

17 This matter comes before the Court on Defendant Washington State University
18 (“WSU”)’s Motion for Summary Judgment. Dkt. #26. Plaintiff Dominique Stewart opposes.
19 Dkt. #32. WSU also moves to strike certain declarations and exhibits attached to Ms. Stewart’s
20 opposition. Dkt. #36. Oral argument was heard on March 21, 2019. Dkt. #52. For the reasons
21 stated below, the Court GRANTS WSU’s Motion and finds that WSU’s Motion to Strike is
22 moot.¹

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24 **I. BACKGROUND**

25 Plaintiff Stewart was enrolled at WSU from the Fall of 2014 to Spring of 2018. Dkt.
26 #27-1 (“Plaintiff Dep.”), 10:3-14, 168:14-24. She is African-American. Dkt. #3 at ¶3.2.
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28 ¹ The Court has determined that this Motion is moot because the Court can grant WSU’s Motion even if it
considered the objectionable evidence presented by Ms. Stewart.

1 The night of Saturday, February 21, 2015, Ms. Stewart and several of her friends went to
2 an event at the Phi Delta Theta fraternity located off-campus. Dkt. #31-1, Ex. 1, ¶ 1. In the
3 early morning hours of February 22, 2015, a white male student who was a member of the
4 fraternity confronted Ms. Stewart while she was waiting for her friends to exit the house. Dkt.
5 #31-1 at 37. According to Ms. Stewart, this student said “why are all these nigger bitches
6 around my house,” and later “I said, get the fuck away from me you nigger bitch.” *Id.* He then
7 slammed the door on her.
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9 On Monday, February 23, Ms. Stewart met with members of Phi Delta Theta and
10 identified the white male as a member of the fraternity; he was then kicked out of the fraternity.
11 *See* Plaintiff Dep. at 39:10-20, 44:23-48:24.
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13 By Tuesday, February 24, the University’s Interim Vice President for Student Affairs,
14 Melynda Huskey, learned of the incident and assembled a team of WSU administrators to
15 respond. *See* Dkt. #31 at ¶9. Dr. Huskey took several actions that day. *See* Dkt. #31-1. Both
16 the University’s Office for Equal Opportunity (“OEO”) and the University’s Office of Student
17 Conduct began to investigate the incident. Dr. Huskey facilitated a meeting between the
18 President of the University’s Black Student Union, the Phi Delta Theta fraternity president, the
19 Associate Director of the SMART START Program/Retention Counselor and African American
20 Student Center, Donna Arnold, and other University administrators. *See id.*
21

22 On February 25, 2015, approximately 100 students, including Ms. Stewart, held a one-
23 hour silent rally on campus to raise awareness about “racism, classism, sexism, ableism, gender
24 discrimination, religious discrimination, etc...” *See* Plaintiff Dep. at 61:7-65:10, 74:16-25.
25 After this event, Ms. Stewart alleges she experienced backlash on social media, including racial
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1 and sexist slurs. Dkt. # 32 at 4. She maintains that she sought assistance from WSU in dealing
2 with this harassment and was provided with none. *Id.*

3 On March 2, 2015, Dr. Huskey met with Ms. Stewart and her mother. Dkt. #34 at ¶ 15.
4 At that meeting, Ms. Stewart's mother requested that the University provide Ms. Stewart with a
5 new dormitory room closer to the Student Recreation Center and her classes. *Id.* Dr. Huskey
6 agreed to do so. *Id.*

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8 On March 5, 2015, Dr. Huskey provided Ms. Stewart and her mother with a written
9 resource guide detailing several sources of University assistance to address the effects of the
10 February 22 incident. *Id.* at ¶ 18. Those resources included counseling and testing services,
11 health and wellness services, accommodation services, and emergency services. *Id.*

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13 Dr. Huskey also provided Ms. Stewart the names of two additional University officials
14 who could meet with her: Donna Arnold, the Director of the University's African-American
15 Student Center, and Karen Fischer, the University's Associate Dean of Students. *Id.* at ¶ 19.
16 Dr. Huskey ensured that Ms. Arnold could meet with Ms. Stewart and provide perspective and
17 support. *Id.* at ¶23. Thereafter, Ms. Stewart had "a couple of" meetings with Ms. Arnold.
18 Plaintiff Dep. at 108:25-109:7, 154:10-13. Ms. Stewart also met with Dean Fischer "a couple of
19 times." *Id.* at 105:5-8, 106:18-22.

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21 On March 10, 2015, the Phi Delta Theta fraternity underwent mandatory
22 diversity/sensitivity training. Dkt. #28 at 2; Plaintiff's Dep. at 159:12-15. This training was
23 conducted by the Director of Diversity Education, Jeff Guillory. *Id.* Members of the fraternity
24 were also required to undergo separate bystander intervention training. Dkt. #31 at ¶ 13.

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26 On March 29, 2015, Plaintiff Stewart was walking off-campus when a car full of
27 unidentified males drove by, and one of them threw a chicken nugget at her while shouting
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1 “nigger THOT!²” Plaintiff Dep. at 135:1-22. The Pullman police department contacted Ms.
2 Stewart, but she could not identify the individuals in the vehicle as students or otherwise, and
3 she could not provide a license plate number for the vehicle. *Id.* at 144:7-20, 145:22-146:17.
4 The WSU police contacted Pullman police to follow up on this incident. Dkt. #30 at ¶ 5. The
5 Pullman police department located a vehicle that matched the vehicle Ms. Stewart described,
6 but determined after investigation the individuals associated with the vehicle were not involved
7 in the March 29 incident. *Id.*

9 On April 2, 2015, Ms. Stewart met with WSU’s President, Elson Floyd. Plaintiff Dep.
10 at 98:22-99:11. Other individuals at this meeting included Jeff Guillory and Ms. Stewart’s
11 female friends who had been present at the Phi Delta Theta incident. The purpose of this
12 meeting was to discuss the incident at Phi Delta Theta on February 22.

14 The parties hotly contest how to characterize this discussion, which was surreptitiously
15 recorded by Ms. Stewart. For purposes of this Motion, the Court can rely on Ms. Stewart’s
16 characterization and transcript of this meeting. Ms. Stewart asserts Mr. Floyd stated that he had
17 “no jurisdiction” over the Phi Delta Theta and other fraternities off campus. *See* Dkt. #32 at 4.
18 The transcript submitted by Ms. Stewart indicates Mr. Floyd stated that he wanted to get
19 jurisdiction over the fraternities, but “as president, I don’t have any control over it.” Dkt. #33-1
20 at 30-33. Ms. Stewart also argues that Mr. Floyd and Mr. Guillory “used the occasion to shame
21 the victims for socializing with Caucasians at fraternities.” Dkt. #32 at 4.

24 Ms. Stewart and her mother had further meetings with Dr. Huskey, the WSU chief of
25 police, and other university staff that same day. Dkt. #31-1 at 30–32; Plaintiff Dep. at 109:8-
26 110:1. Ms. Stewart’s mother requested 24-hour police security for her daughter, but this was
27 declined for lack of resources. Dkt. #30 at 2. At the conclusion of these meetings, Dr. Huskey
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² As understood by Plaintiff, this is an offensive acronym for “that ho over there.” *See* Dkt. #32 at 4.

1 provided Ms. Stewart with referral information for the Student Counseling Center, Health and
2 Wellness Center, Access Center, and Pullman Police Department. Dkt. #31-1 at 34. Dr.
3 Huskey discussed options for Ms. Stewart to withdraw from some courses or even to withdraw
4 from the university altogether. *Id.*

5 After the April 2 meeting, President Floyd authorized Mr. Guillory to hire DaVina Hoyt
6 to support and provide leadership development opportunities to Ms. Stewart and the other
7 women who were present at the fraternity. *See id.* at 32.

9 On April 9, 2015, the OEO completed its investigation, which concluded that the student
10 who had insulted Ms. Stewart on February 22 violated WSU's policy prohibiting
11 discrimination. Dkt. #31-1 at 37–56. The OEO sent the report to the University's Office of
12 Student Conduct. On April 30, 2015, the Office of Student Conduct concluded the student who
13 racially and sexually insulted Ms. Stewart on February 22 violated WSU's student conduct
14 standards. Dkt. #31 at 8. WSU then expelled him. *Id.* The student went through an appeals
15 process and WSU upheld the expulsion. *Id.*; Dkt. #31-1 at 63–65. Ms. Stewart is aware of the
16 student's expulsion, appeal, and WSU upholding the expulsion. Plaintiff Dep. at 129:22-130:9.
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19 Ms. Stewart graduated from the University in the Spring of 2018 with a 3.1 grade point
20 average. *Id.* at 168:14–169:4.

21 Plaintiff Stewart filed this case on April 16, 2018. Dkt. #1. Her Amended Complaint
22 states the following causes of action: violation of Title VI (40 U.S.C. § 2000d), violation of
23 Title IX (20 U.S.C. § 1681), violation of the Clery Act (20 U.S.C. § 1092), and the common law
24 torts of outrage and negligence. Dkt. #3.
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II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

On a motion for summary judgment, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable inferences in favor of the non-moving party. *See O’Melveny & Meyers*, 969 F.2d at 747, *rev’d on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient showing on an essential element of her case with respect to which she has the burden of proof” to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Analysis

1. Title VI and Title IX Claims

The Court will first address Ms. Stewart’s Title VI and Title IX claims. *Davis Next Friend. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999) sets forth the basic standard for such claims:

[F]unding recipients are properly held liable in damages where they are: (1) deliberately indifferent, (2) to [] harassment, (3) of

1 which they have actual knowledge, (4) that is so severe, pervasive,
2 and objectively offensive, (5) that it can be said to deprive the
3 victims of access to the educational opportunities or benefits
4 provided by the school.

5 *S.S. v. Alexander*, 143 Wn. App. 75, 99, 177 P.3d 724, 736 (2008) (citing *Davis*, 526 U.S. at
6 650, 119 S.Ct. 1661)). “In an appropriate case, there is no reason why courts, on a motion to
7 dismiss, for summary judgment, or for a directed verdict, could not identify a response as not
8 ‘clearly unreasonable’ as a matter of law.” *Davis*, 526 U.S. at 649.

9 There is no dispute that WSU qualifies as a funding recipient under the above statutes.
10 The parties appear to agree that the record supports the second through fifth prongs above, or at
11 least that there are genuine disputes as to material facts for these prongs. *See* Dkt. #37 at 1 n.1.
12 The real dispute before the Court is whether Ms. Stewart has made a sufficient showing that
13 WSU was “deliberately indifferent” to the harassment above to survive summary judgment. *See*
14 *Celotex, supra*.

15 “Funding recipients are deemed ‘deliberately indifferent’ to acts of student-on-student
16 harassment only where the recipient’s response to the harassment or lack thereof is clearly
17 unreasonable in light of the known circumstances.” *Mercer Island Sch. Dist. v. Office of the*
18 *Superintendent of Pub. Instruction*, 186 Wn. App. 939, 971, 347 P.3d 924 *review denied sub*
19 *nom. Mercer Island Sch. Dist. v. N.W. ex rel. B.W.*, 184 Wn.2d 1024, 361 P.3d 746 (2015)
20 (quoting *Davis*, 526 U.S. at 648). Deliberate indifference requires an “official decision... not to
21 remedy the situation.” *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006)
22 (quoting *Davis and Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989,
23 141 L. Ed. 2d 277 (1998)). Further, “an aggrieved party is not entitled to the precise remedy
24 that he or she would prefer.” *Id.*

1 *S.S. v. Alexander* lists a broad range of insufficient and/or unreasonable responses to
2 peer-on-peer harassment: failure to properly investigate, failure to notify law enforcement,
3 failure to meaningfully and appropriately discipline the student-harasser, minimization of the
4 discriminatory import of the harassment, etc. WSU highlights in its Reply brief why *Alexander*
5 is factually distinct from what happened in this case. *See* Dkt. #37 at 9. In *Alexander*, a female
6 student at the University of Washington, S.S., was raped and harassed by her former boyfriend,
7 who was a player on the UW football team. 143 Wn. App. at 85. S.S. was also employed by
8 the UW as an assistant equipment manager for the football team. After reporting the incident,
9 she was approached by the UW’s associate athletic director and it was suggested that she
10 transfer away from her position with the team. *Id.* at 86. She was told that if she revealed she
11 was raped by a member of the team, “it would reflect poorly on the University of Washington’s
12 handling of the situation.” *Id.* When S.S. suggested she file a police report, she was told to
13 wait. UW’s designated Title IX compliance officer and other officials decided to conduct a
14 mediation between S.S. and her alleged rapist. *Id.* at 87. No other options were presented to
15 S.S. During the mediation, S.S. expressed her desire that the alleged rapist be suspended from
16 participation in several football games. *Id.* at 88. In response, the alleged rapist denied S.S.’s
17 allegations and threatened to leave the UW if he were suspended from any football games. *Id.*
18 UW’s assistant athletic director refused to consider suspending the alleged rapist, stating that
19 the media “would ask why he was not playing.” *Id.* At the conclusion of the mediation, UW’s
20 representatives decided that the alleged rapist would undergo counseling and perform
21 community service. *Id.* S.S. was not satisfied with this outcome, but was essentially told by
22 UW representatives that the matter was closed. The *Alexander* court found a genuine issue of
23 material fact existed regarding the issue of deliberate indifference. 143 Wn. App. at 106.
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1 WSU argues here that they did the “direct opposite” of the UW by not treating the
2 offending student and Plaintiff Stewart equally, by immediately investigating Ms. Stewart’s
3 claim through the OEO and the Office of Student Conduct, by working with the Pullman police
4 department, and by actually expelling the student-harasser. Dkt. #37 at 9.

5 Plaintiff Stewart argues that WSU “chose a limited response to only the first of two
6 attacks separated by barely more than a month,” and that it “absolved itself of responsibility to
7 investigate the chicken-throwing incident of March 29, ostensibly due to ‘jurisdictional’
8 questions, despite the fact that the incident, like the attack at the fraternity, occurred on WSU’s
9 own Greek Row and within its jurisdiction.” Dkt. #32 at 11. Ms. Stewart maintains that
10 “University President Floyd and Director Guillory personified deliberate indifference,
11 minimizing the harassment, disavowing responsibility for Greek Row, and blaming the women
12 for being where they ‘did not belong.’” *Id.* at 12.

13 At oral argument, Ms. Stewart’s counsel argued that WSU did not take steps to prevent
14 Ms. Stewart and the alleged harasser from crossing on campus, that the investigation did not
15 proceed quickly enough, that WSU did not help Ms. Stewart academically, and that WSU failed
16 to adequately investigate the March 29 incident by looking for surveillance footage or
17 interviewing potential witnesses.

18 After considering all of the above, the remainder of the parties’ briefing, and the parties’
19 positions during oral argument, the Court agrees with WSU that its actions here stand in stark
20 contrast to the actions of the University of Washington in *S.S. v. Alexander*. WSU’s response
21 may have been far from perfect, but it does not rise to the level of deliberate indifference. A
22 few statements from President Floyd that could be characterized as indifference are insufficient
23 to create liability for WSU.
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1 Title VI and Title IX look to the response from the institution. Ms. Stewart has been
2 unable to point to any facts in this case that cast WSU's *response* as deliberately indifferent—
3 *i.e.*, that show WSU's response or lack thereof was clearly unreasonable in light of the known
4 circumstances. Ms. Stewart's Amended Complaint challenges WSU's responses to two
5 incidents—the February 22 incident at the fraternity and the March 29 chicken-throwing
6 incident.³ Dkt. #3. Whether or not WSU was being sufficiently genuine in its motivations, as
7 potentially reflected in President Floyd's comments, it is undisputed that WSU promptly
8 investigated the February 22 incident and disciplined the student-harasser with expulsion. It is
9 unclear what more WSU could have done to deal with that incident while affording due process
10 to the harassing student. The record demonstrates WSU and its campus police force were aware
11 of the March 29 incident, determined that the Pullman police department was investigating, but
12 that the police and Ms. Stewart were ultimately unable to identify the harassing individuals
13 involved. In addition to investigations, WSU provided Ms. Stewart with at least some access to
14 counseling services, and made at least some attempt to accommodate Ms. Stewart's requests.
15 WSU was not required to provide Ms. Stewart with the remedies she would have preferred. *See*
16 *Oden*, 440 F.3d at 1089.

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20 Ms. Stewart's strongest evidence of deliberate indifference comes from the meeting with
21 President Floyd's on April 2, 2015. However, even if the Court assumes the alleged statements
22 were made by Mr. Floyd, those statements cannot outweigh the *actions* of WSU. No reasonable
23 jury could conclude that WSU's *response* to these two incidents demonstrates deliberate

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25 ³ During oral argument, Ms. Stewart's counsel argued there were actually three or even four incidents, including
26 the above two incidents, but also the social media harassment and the meeting with President Floyd. The Court
27 finds that Ms. Stewart has argued outside the scope of her pleadings, but in any event these two additional
28 "incidents" do not create a question of fact as to WSU's deliberate indifference because Ms. Stewart was unable to
present admissible evidence that WSU had actual knowledge of the online harassment and made an official
decision not to remedy the situation, or that Mr. Floyd's comments in the one meeting constitute harassment that is
so severe, pervasive, and objectively offensive that it can be said to deprive Ms. Stewart of access to the
educational opportunities or benefits provided by the school.

1 indifference, even if President Floyd’s commentary on the incidents (or on WSU’s ability to
2 respond to the incidents) could be interpreted as showing indifference, minimizing the
3 harassment, or casting blame on Ms. Stewart for being at the fraternity. WSU’s actions spoke
4 louder than words.

5 **2. Clery Act, Negligence, and Outrage Claims**

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7 WSU points out that there is no private right of action for a violation of the Clery Act.
8 Dkt. #37 at 10 (citing 20 U.S.C. §1092(f)(14)(A)). This claim will be dismissed.

9 With regard to Ms. Stewart’s negligence claim, WSU argues that “the evidence shows
10 the University comprehensively addressed the two incidents of discrimination Plaintiff
11 experienced, whether or not it met Plaintiff’s expectations,” and that “there is no evidence of a
12 breach of duty that proximately caus[ed] Plaintiff’s alleged damages.” Ms. Stewart argues she
13 can proceed on her negligence claim despite the Public Duty Doctrine because WSU violated
14 Title VI, Title IX, and the Clery Act. *See* Dkt. #32 at 20-21. The Court has already found that
15 WSU did not violate Title VI and Title IX as a matter of law, and Ms. Stewart has failed to
16 make a sufficient showing that WSU’s alleged violation of the Clery Act could have
17 proximately caused her damages. Accordingly, the Court finds no basis for the negligence
18 claim to survive summary judgment.
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21 Turning to outrage, this tort requires three elements: (1) extreme and outrageous
22 conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to
23 plaintiff of severe emotional distress.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 195-196, 66 P.3d
24 630 (2003). These elements were adopted in Washington State from the *Restatement (Second)*
25 *of Torts* § 46 (1965) in *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975). Grimsby
26 further held that any claim for intentional infliction of emotional distress must be predicated on
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1 behavior “so outrageous in character, and so extreme in degree, as to go beyond all possible
2 bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized
3 community.” 85 Wn.2d at 59 (quoting *Restatement (Second) of Torts* § 46 cmt. d).

4 Ms. Stewart points solely to the April 2, 2015, meeting with President Floyd as the
5 source of her outrage claim. See Dkt. #3 at 8; Dkt. #32 at 21–22. WSU characterizes that
6 meeting as “little more than a personal, quasi-parental expression of advice and perspective
7 from two male African-American University leaders to female African-American students who
8 had experienced racism and sexism.” *Id.* at 12. The Court need not determine whether WSU’s
9 characterization or Ms. Stewart’s characterization of this meeting is correct. The Court finds
10 Ms. Stewart has, as a matter of law, failed to point to conduct that is so outrageous in character,
11 and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
12 atrocious, and utterly intolerable in a civilized community. The Court will dismiss this last
13 claim on summary judgment as well.
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16 III. CONCLUSION

17 Having reviewed the relevant briefing, attached declarations, and the remainder of the
18 record, the Court hereby finds and ORDERS that Defendant Washington State University’s
19 Motion for Summary Judgment, Dkt. #26, is GRANTED. WSU’s Motion to Strike, Dkt. #36, is
20 DENIED AS MOOT. All of Plaintiff Stewart’s claims are DISMISSED. This case is
21 CLOSED.
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24 DATED this 26 day of March, 2019.

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27 RICARDO S. MARTINEZ
28 CHIEF UNITED STATES DISTRICT JUDGE